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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOSEPH MASIN and EVA MARIA MASIN

Petitioners,

vs.

VINCENT DRAIN and RUTH DRAIN

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT, DIVISION SIX

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QUESTION PRESENTED

How much discrimination is permissible under the Federal Fair Housing Act?

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Petitioners JOSEPH MASIN and EVA MARIA MASIN pray that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Second Appellate District, Division Six entered in this proceeding on May 29, 1985, review of which was

denied by the California Supreme Court on September 11, 1985.

OPINION BELOW

The opinion of the Court of Appeal, unreported, appears in Appendix A. No opinion was rendered by the California Supreme Court in denying the petition for review.

JURISDICTION

The judgment of the Court of Appeal was entered on May 29, 1985. A timely petition for review was denied by the California Supreme Court on September 11, 1985. This petition for certiorari was filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISION INVOLVED

United States Code, Title 42:

§ 3604. Discrimination in the sale

or rental of housing

As made applicable by section 803 [42 USCS § 3603] and except as exempted by sections 803(b) and 807 [42 USCS §§ 3603(b), 3607], it shall be unlawful --

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Petitioners EVA and JOSEPH MASIN are husband and wife. EVA is a German national and JOSEPH is a nationalized U.S. citizen from Czechoslavakia. In 1978, Petitioners decided to move from Cologne, Germany to Santa Barbara, California, and retained real estate brokers to find them a home. The brokers located an estate owned by Respondent RUTH DRAIN in Montecito, an exclusive and parochial community outside Santa Barbara. RUTH's husband

VINCENT DRAIN acted as his wife's agent in negotiating the sale of the estate.

Petitioners made an initial offer to purchase which Respondents rejected as too low and because Respondents wanted more information about "the Germans". The parties later agreed to split the difference in price, and attorneys were retained to resolve the tax implications of the sale.

After these issues were resolved and sale documents were prepared, the paperwork was submitted to Respondents for execution. A delay of several weeks ensued, during which Petitioners' real estate agents repeatedly contacted Respondents' agents. Petitioners' agents were informed that Respondents were refusing to sell to "those Germans", but that this did not represent a civil rights violation because civil rights "only applies to blacks".

Petitioners' agents later attempted to present the offer directly to Respondents. VINCENT DRAIN refused to accept it, stating that Respondent would not sell the estate to "those God damn Germans" and that Respondents were removing the residence from the market for sale that year.

Four days later Respondents sold the estate to a third party on terms virtually identical to those offered by Petitioners. Petitioners thereafter filed suit against Respondents and their real estate agents for, inter alia, violating the Federal Fair Housing Act.

A thirteen-day jury trial was presided over by a retired judge sitting by designation. Petitioners requested a jury instruction which provided: "EVA MASIN's national origin need not be the sole reason for defendants' conduct to make such conduct illegal if national

origin was an element of that conduct." The judge refused to give this instruction, and instead instructed the jury that: "EVA MASIN' national origin need not be the sole reason for defendants' conduct to make such conduct illegal if national origin was one significant factor in that conduct." A nine-to-three jury verdict was rendered in favor of Respondents.

In their post-trial motions, Petitioners argued that the jury instruction represented an improper interpretation of a federal statute as the Federal Fair Housing Act provides that national origin may not play any role in a decision to refuse to provide housing. The motions were denied by the

trial court and this appeal followed.[1]

The California Court of Appeal upheld the trial court. The Court of Appeal recognized that there is a distinction between the standard proposed by Petitioners and that adopted by the trial court, but it characterized that distinction as one not "sufficiently significant" to assign error. The California Supreme Court apparently agreed with this analysis as it denied the petition for review.

REASONS FOR GRANTING THE WRIT

1. THIS CASE PRESENTS AN IMPORTANT QUESTION OF NATIONAL SIGNIFICANCE IN THE AREA OF FEDERAL CIVIL RIGHTS LAW.

The question presented in this

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1. While Petitioners also assigned error to the improper admission of certain evidence, it is their position that had the correct instruction been given, the admission of that evidence would have been merely harmless error. Thus, it cannot be said of this case that the judgment rests on adequate non-federal grounds despite the presence of a substantial federal question.

Petition is simple, yet of nation-wide significance. Unfortunately, the answer is not so simple, as evidenced by the results reached by the various courts, both federal and state, which have grappled with the problem.

The issue which this Court is requested to resolve is whether discrimination need only be "a factor" in a defendant's refusal to provide housing, or whether it must be "a substantial factor" before liability can be imposed.[2/] Petitioners submit that the distinction between the two standards is critical because the latter standard permits "partial discrimination" and

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2. A third standard was also discussed by the California Court of Appeal: Whether discrimination must be "a motivating factor." Petitioners submit that "a motivating factor" and "a factor" are in essence the same standard, and that they each represent a standard quite different from that of "a substantial factor."

allows a defendant to escape liability by claiming that even though he was motivated by bigotry, other factors contributed more heavily to his decision and thus were more "significant."

Whichever standard is ultimately adopted by this Court will have far-reaching effects. Not only will there finally be a uniform standard for application of the Fair Housing Act, but that standard can be extended into related areas, such as age and employment discrimination. The result will be a coherent, consistent administration of federal civil rights laws from the elitist communities of southern California across the country to the rural south and on up to the industrial cities of the Northeast.

2. THE DECISION BELOW CONFLICTS WITH THE PRINCIPLES ARTICULATED BY THIS COURT IN ARLINGTON HEIGHTS.

Nearly ten years ago, this Court ren-

dered its decision in Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977). In discussing the difficulty of determining whether a legislative body had been motivated by discrimination, the Court noted that judicial deference to legislative decisions is inappropriate "[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision" (Id., at 265-66, emphasis added).

This Court has not yet directly faced the precise issue presented in this Petition. However, under the reasoning of Arlington Heights, a plaintiff need not prove that a defendant's refusal to sell or rent was based solely on discriminatory motives, nor must the plaintiff show that such motives represented a "substantial factor" in the defendant's decision. Instead, the plaintiff need

only demonstrate that discrimination was "a motivating factor" in order to prevail.

The time is now ripe for this Court to clarify that the position taken in Arlington Heights is the law of the land. If that standard is adopted, results such as that in the instant case, where a trial judge is permitted to capriciously "shop" for a standard which appeals to his personal views, will be avoided. More importantly, all will know that discrimination, in whatever form and to whatever degree, will not be tolerated, and the way will finally be paved for its total eradication.

3. THE DECISION BELOW CONFLICTS WITH THOSE OF THE VAST MAJORITY OF CIRCUIT COURTS OF APPEAL.

Numerous Circuit Courts of Appeal have followed the lead set by this Court in Arlington Heights and have held, in

one form or another, that discrimination may not be a factor in a refusal to sell or rent property.[3/] Thus, it can safely be said that this represents the "majority rule."

In contrast is the Fifth Circuit Court of Appeal, the only circuit which has adopted the "substantial factor" test which was followed by the trial court in the instant case. This standard was first enunciated in United States v. Pelzer Realty Co., Inc., 484 F.2d 438 (5th Cir. 1973), cert. denied, 416 U.S. 936 (1974), where it is set out

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3. See, e.g., Atkins v. Robinson, 733 F.2d 318 (4th Cir. 1984); United States v. City of Parma, Ohio, 661 F.2d 562 (6th Cir. 1981), cert. denied, 456 U.S. 926 (1982); Jordan v. Dellway Villa of Tenn., Ltd., 661 F.2d 588 (6th Cir. 1981), cert. denied, 455 U.S. 1008 (1982); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2nd Cir. 1979); United States v. Mitchell, 580 F.2d 789 (5th Cir. 1978); Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1971).

with no supporting authority (Id., at 443). Significantly, not all decisions in that circuit have followed it, thus implying that it may have been either implicitly disapproved or dictum. (United States v. Mitchell, supra at note 3; but see, Woods-Drake v. Lundy, 667 F.2d 1198, 1202 (5th Cir. 1982).

There is thus a square and irreconciliable conflict between the Fifth Circuit and every other Circuit which has considered the issue. Until this Court definitively states what standard must be met to establish a violation of the Act, courts will continue to arbitrarily apply whichever test suits their fancy. Thus, a defendant who commits the identical act of discrimination in two jurisdictions will be guilty of violating federal law in one and will be absolved in the other, a truly absurd result.

4. THE DECISION BELOW SANCTIONS ILLEGAL DISCRIMINATION, ENCOURAGES VIOLATIONS OF CIVIL RIGHTS, AND UNDERMINES THE POLICIES BEHIND THE FAIR HOUSING ACT.

The Fair Housing Act states that "it is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States" (42 U.S.C. § 3601). The Act was adopted to implement a policy "to which Congress has accorded the highest national priority," the elimination of all discrimination (United States v. Henshaw Bros., Inc., 401 F.Supp. 399, 402 (E.D. Va. 1974)). "All discrimination" includes "partial discrimination" (Smith v. Sol D. Adler Realty Co., supra, at note 3, 349-50).

To require that discrimination be "significant" before liability can be imposed subverts the purposes of the Act; it allows a person who admittedly is motivated by prejudice to escape

liability if he can show that other factors also contributed to his decision. Petitioners respectfully submit that Congress never intended that the legal repercussions of bigotry could be so easily evaded.

5. CERTIORARI SHOULD BE GRANTED TO DISCOURAGE UNNECESSARY LITIGATION AND TO FINALLY RESOLVE THIS RECURRING PROBLEM.

Until this Court adopts a uniform standard, the Act will continue to be interpreted in a capricious and idiosyncratic manner by both federal and state courts. Some courts will continue to find that the presence of any amount of discrimination gives rise to liability, even if the defendant proves that he was also motivated by other, legitimate factors. Other courts will require that discrimination be the obvious and exclusive reason for the defendant's refusal, while still others will require

the trier of fact to "weigh" the discriminat. . .o determine whether it is "significant."

Even if the Court does not agree with Petitioners' position, the issue should nevertheless be resolved, if for no other reason than basic principles of fairness. It is submitted that there are other attorneys in the country who, like Petitioners' counsel, conclude their clients have a viable claim for violation of the Act under the "majority rule." These attorneys and their clients should be spared the surprise of discovering at trial that a much more stringent standard of proof must be met, a standard which is arbitrarily chosen by a trial judge who believes "some" discrimination is acceptable so long as it is not "significant." Thus, if a clear, consistent test as to what constitutes a violation is delineated,

needless litigation could be reduced, if not eliminated entirely.

6. THE DECISION BELOW IS INCORRECT AND RESULTED IN A MISCARRIAGE OF JUSTICE.

As there was no uniform standard to provide guidance as to how the Act should be construed, the trial court in this action chose to follow the dubious course set by the Fifth Circuit. In response to Petitioners' argument that the jury instruction represented reversible error, the trial judge justified his decision on the basis of his personal views:

> "Your argument about the significant factor is certainly a highly debateable [sic] subject but I am inclined to feel that there is a lot to be said in support of the the position taken by the Circuit Court in stating that the discrimination must be a significant factor. If you stop and think for a moment that bias is a human trait that permeates all of us, it runs all through society, it's practically impossible to eliminate bias from the whole human context. Therefore, it seems to be logical

> for the Circuit Court to suggest that in trial to determine the rights of people, depending on whether there was bias involved, the bias must at least be identifiable and it must be a substantial or significant factor in determining the outcome; otherwise, there would be no way of detecting this insidious infection called bias that permeates all of human life."

This is precisely the type of reasoning which necessitated the adoption of the Act. While it may be true that bias is practically impossible to eliminate from life, that does not justify a refusal to enforce a law which was designed to accomplish exactly that.

Had the trial court correctly construed the Act, Petitioners would have prevailed. There was evidence, both direct and circumstantial, which established that Petitioners' national origin played a role in Respondents' refusal to sell. Thus, the jury could have accepted Petitioners' case in toto

as true, yet still rendered a verdict for Respondents. It is submitted that the jury did precisely that, thus implicitly sanctioning the violation of Petitioners' civil rights.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal.

Respectfully submitted,

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APPENDIX

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JOSEPH MASIN and EVA MARIA MASIN, husband and wife, et al.,	)	2d Civil No. B-002033
	)	(Super. Ct. No. 124420)
Plaintiffs and Appellants,	)	(Santa Barbara County)
v.	)	
VINCENT DRAIN and RUTH DRAIN, husband and wife, et al.,	)	
Defendants and Respondents.	)	

Joseph Masin and Eva Maria Masin appeal from a judgment by jury verdict in favor of Vincent Drain and Ruth Drain, respondents herein and defendants in the lower court. The lawsuit followed a complaint filed by Masins and their real estate broker, Bob Jones (Bob

Jones Realty) against Drains and their real estate broker Arthur Bromfield (Sears Realty) for housing discrimination, fraud, breach of contract, and declaratory relief. At trial, the court allowed Masins to add an additional cause of action for conspiracy. The trial court had previously entered summary judgment in favor of defendants on the causes of action for breach of contract and declaratory relief which this court affirmed on appeal in Jones v. Drain (1983) 149 Cal.App.3d 484 and Masin v. Drain (1984) 150 Cal.App.3d 714.

Appellants allege the trial court both erroneously instructed the jury on discrimination as a factor in rejecting an offer and admitted into evidence a letter written by Ruth Drain's tax attorney. We find no error and affirm the judgment.

FACTS

Viewed in the light most favorable to the judgment, the record reflects that April 12, 1978, Ruth Drain signed an exclusive listing agreement with Sears Realty to sell her Santa Barbara residence for $775,000, all cash. In the summer of 1978, Masins made an offer of $700,000 which Drains refused.[1/] Further negotiations resulted in a proposed option to purchase to be executed in 1978 but not exercised until after January 1, 1979, in order to avoid adverse taxes in 1978. The option price was to be applied to the purchase price, and escrow would not open prior to January 1, 1979.

Mr. Hay testified that he met with Mrs. Masin and her brokers August 4,

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1. Although Mrs. Drain owned the house, Mr. Drain was included in some discussions.

1978, to discuss the restructuring of their offer and that several days later, after conferring with Masins' attorney, Anthony Romasanta, received the option and contract from Romasanta, which he forwarded to his client. Because Hay was concerned that the option agreement might appear a sham to the tax authorities, he also advised the Drains to consult a tax attorney in Texas where they were living.[2/] Additionally, he mentioned possible tax problems with the offer from another party, David Boggs. The Drains consulted a tax attorney in Texas who wrote to Hay. Mrs. Drain told Hay that she was rejecting Masins' offer for the tax reasons he and her tax attorney had mentioned.

Hay testified further that he reduced

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2. Apparently Mrs. Masin had signed both the option and the sales contract attached to it.

to writing August 29, 1978, an oral offer from David Boggs which Ruth Drain had accepted August 24. Boggs had offered the full cash price of $775,000 with an option payment of $100,000 and a sale delayed to early 1979. Masins' offer had been $735,000.

The thrust of appellants' evidence at trial was that Masins' brokers had been led to believe through Drains' attorney and brokers that their offer of $735,000 had been accepted and that the Drains had refused to sell the property to "the German," Mrs. Masin, for the sole reason

that she was German.[3]

DISCUSSION

1. Adequacy Of Instructions Regarding The Fair Housing Act.

Appellants instituted action for discrimination pursuant to the Fair Housing Act, which provides in pertinent part: ". . . [I]t shall be unlawful--(a) to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale

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3. Appellants have not raised the issue of substantial evidence but nevertheless argue that "all reasonable inferences lead to the conclusion that the last-minute sale to Boggs on identical terms was concocted for the purpose of selling . . . to a person of national origin more acceptable to the Drains" and that there is "overwhelming evidence in the record that a verdict would have been rendered in favor of the Masins had not the improper instruction been given." Assuming we could reweigh the evidence, we would refuse to do so on this selectively designated record. Suffice it to say that the evidence was in conflict and there is substantial evidence in the record before us to support the judgment.

or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin." (42 U.S.C. § 3604.) In addition to instructing the jury in the words of the statute, the trial court gave the following instructions: "If you find that after Mrs. Masin made a bona fide-that is, a good faith-offer to purchase the property owned by Mrs. Drain at 830 Picacho Lane either Vincent Drain or Ruth Drain or both of them refused to sell or to negotiate for the sale or otherwise made that property unavailable to Mrs. Masin because of her national origin, then the defendant or defendants who did so are subject to liability for damages sustained by the plaintiffs. [¶] The mere listing of property for sale does not obligate the owner to sell the property to a prospective purchaser who

does not offer to buy it on the terms stated in the listing. Until an offer conforming to the terms of the listing is made, the owner may terminate the listing without liability to any prospective purchaser. This, however, does not authorize an owner to refuse to accept a bona fide offer or to negotiate with a prospective buyer because of the national origin of the person making the offer or seeking to negotiate for the purchase of the property. [¶] In order to be a violation of the statute I have read to you, it is not necessary that refusal of the owner to sell or negotiate for the sale of a dwelling house because of the national origin of the prospective buyer be the only reason. It is a violation of law if national origin is <u>one significant factor</u> in rejecting an offer that meets the terms on which the owner is willing to sell."

(Emphasis added.)

Appellants take umbrage with the underlined portion of the last sentence in the quoted instruction. They contend the trial court should have accepted their version of the instruction which read, in pertinent part, ". . . make such conduct illegal if national origin was an element of that conduct." (Emphasis added.) The trial court obtained the phrase "one significant factor" from United States v. Pelzer Realty Company, Inc. (5th Cir. 1973) 484 F.2d 438 wherein the court stated: "We need not and do not find that racial prejudice dominated Thames' mind during the negotiations. It is enough that race was one signficiant factor he considered in his dealings with the men. Defendants and their attorney continually reiterated Thames' concern with his financial investment in the unsold

houses in Seth Johnson Estates. We do not doubt that his primary goal was to make money, not to violate the Fair Housing Act. But it is not necessary to show that Thames intended to deprive Barnett and Marshall of rights granted by the Act. A violation occurred because his words had that effect."

Appellants assert that the phrase "one significant factor", which has been repeated consistently in Fifth Circuit cases is an impermissible standard, and that the states which comprise that circuit are not famous for their zealous protection of civil rights. Instead, appellants further argue, the trial court should have adopted, and this court should espouse, the more "liberal" phrase, "an element", which appellants took from Zuch v. Hussey (E.D. Mich. 1975) 394 F.Supp. 1028, 1047. Appellants' interpretation of the cases

involving alleged violations of the Fair Housing Act is misfocused.

Zuch v. Hussey, supra, held that the Fair Housing Act of 1968 (42 U.S.C. 3601, et seq.) should be liberally conthe purchaser which the Act protects. (394 F.Supp. at 1047.) It then cited Williamson v. Hampton Management Company (1972) 339 F.Supp. 1146 (Ill.) for the proposition that race need not be the sole reason for the decision to refuse to sell or rent if it is an element in that decision. That case, however, cited Smith v. Sol D. Adler Realty Company (7th Cir. Ill. 1971) 436 F.2d 344 for that proposition and Smith v. Sol D. Adler Realty Company did not use the phrase "an element" at all. What Smith v. Sol D. Adler Realty Company said was that "[r]ace is an impermissible factor in an apartment rental decision and it cannot be brushed aside

because it was neither the sole reason for discrimination nor the total factor of discrimination. We find no acceptable place in the law for partial racial discrimination." (Id., at 349-350, emphasis in the original.)

In order to assay the propriety of the trial court's choice of phrases, it is helpful to look to Arlington Heights v. Metro. Housing Corp. (1977) 429 U.S. 252 where a real estate developer sued a municipality, alleging that its refusal to rezone land on which he intended to build low-and moderate-income housing was racially discriminatory in violation of the Fair Housing Act. The United States Supreme Court held that when there is proof that a discriminatory purpose has been a motivating factor in a decision of legislators or administrators, judicial deference is no longer justified, and that proof that a

rezoning denial was motivated in part by a racially discriminatory purpose will not necessarily require invalidation of the challenged decision, but will shift the burden of establishing that the same decision would have resulted. (Id., at pp. 265-266.)

Cases involving the Fair Housing Act, as appellants correctly indicate, are not consistent in their terminology. Many Fifth Circuit cases continue to use "a significant factor" or "one significant factor", e.g., Woods-Drake v. Lundy (1982) 667 F.2d 1198 which lists other cases using that phrase. Other courts use "a motivating factor" or "competing consideration", e.g., Atkins v. Robinson (DCA Va. 1982) 545 F.Supp. 852; United States v. City of Parma, Ohio (1981) 661 F.2d 562; United States v. City of Birmingham, Mich. (1982) 538 F.Supp. 819. Still others employ the terms "a

part", "any part", "a consideration", "some role", or "an element", e.g., Bishop v. Pecsok (Ohio 1976) 431 F.Supp. 34; Jordan v. Dellway Villa of Tenn., Ltd. (6th Cir. 1981) 661 F.2d 588; United States v. Mitchell (5th Cir. 1978) 580 F.2d 789, 791; Zuch v. Hussey, supra, 394 F.Supp. 1028; Shaw v. Cassar (E.D. Mich. 1983) 558 F.Supp. 303.

A close reading of the cases cited reveals that almost all hark back to Smith v. Sol D. Adler Realty Company, supra, or more recently to Arlington Heights, supra. Moreover, the pervasive theme in all the cases (even those in the suspect Fifth Circuit) is that race is an impermissible consideration in a real estate transaction (Moore v. Townsend (7th Cir. 1975) 525 F.2d 482, 485) and that race need not be the sole motivating factor in a denial that has discriminatory effect in order

for plaintiff to succeed in a claim under the Fair Housing Act (Robinson v. 12 Lofts Realty, Inc. (2nd Cir. N.Y. 1979) 610 F.2d 1032, 1042). A denial violates the statute if race is even one of the motivating factors. (Ibid.)

Although we find the phrase "a motivating factor" more consistent with the United States Supreme Court's holding in Arlington Heights and preferable to either "an element" or "one significant factor", we do not find the distinction among the three phrases sufficiently significant to assign error to the trial court's choice. The trial court fully and fairly instructed the jury in the applicable law and the instruction in question did not lead to a miscarriage of justice. (Cal. Const., arts. VI, § 13; see Henderson v. Harnischfeger Corp. (1974) 12 Cal.3d 663, 674.)

2. Admissibility Of The Tax Attorney's Letter.

During the trial, John Hay read to the jury the letter written by Drains' tax attorney, Emery, which advised the Drains against accepting Masins' offer because of adverse tax consequences that year. Hay testified that after reviewing Masins' offer, he became concerned that it would not solve the tax problem and that he wrote to the Drains and advised them to consult a tax expert. The trial court admitted into evidence, and allowed to be read to the jury, both the letter from Hay to Drains and the letter from Emery to Hay explaining what he had advised the Drains. Hay also testified that he discussed Emery's letter with Mrs. Drain. The letters were admitted for the limited purpose of proving that the letters were sent. Appellants objected

to the Emery letter on the grounds of relevancy, hearsay, and undue prejudice.

Appellants contend the letter was inadmissible hearsay and unduly prejudiced them because a juror stated by affidavit that members of the jury referred to that letter as a factual and accurate interpretation of the tax consequences if Mrs. Drain had accepted Masins' offer.[4/] Appellants raised this point in their motion for new trial which the trial court denied.

Hearsay is defined as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code § 1200, subd. (a).) The Emery letter was not hearsay. It was not offered to

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4. This juror was one of three who did not join in the verdict for respondents.

prove that Emery's analysis of the impact on his clients' taxes if Mrs. Drain accepted the offer was correct, but only that she believed that to be the case and that such statements were made to her. (Stewart v. Estate of Bohnert (1980) 101 Cal.App.3d 978, 990.) As stated in Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal.3d 98, 109, "'[t]here is a well-established exception or departure from the hearsay rule applying to cases in which the very fact in controversy is whether certain things were said . . . and not . . . whether these things were true or false, and in these cases the words . . . are admissible not as hearsay, but as original evidence.' [Citations.]" The letter was highly relevant on the issue of whether Mrs. Drain refused to sell her residence to Masins because of racial reasons or tax reasons, and even

if hearsay, would have been admissible for the limited purpose for which the trial court admitted it. "It is well established that a statement by the declarant may be admitted if it tends to show the mental state or attitude of the person who heard it or read it." (Stewart v. Estate of Bohnert, supra, 101 Cal.App.3d 978, 990.)

Appellants do not directly claim jury misconduct but mention it obliquely with reference to the jury's allegedly considering the Emery letter for the truth of the matter stated. Assuming there was jury misconduct (and we specifically do not make such a finding), it is not prejudicial per se. (People v. Sutter (1982) 134 Cal.App.3d 806, 820.) Appellants concede in both opening and reply brief that if the jury was instructed correctly concerning the standard for unlawful discrimination,

the error in admitting the Emery letter would be at most harmless or nonprejudicial. We find that the jury was instructed correctly and that error, if any, in admitting the letter was harmless.

3. Law Of The Case.

Respondents urge us to find that our prior decisions in Jones v. Drain, supra, 149 Cal.App.3d 484 and Masin v. Drain, supra, 150 Cal.App.3d 714 are law of the case. In Masin v. Drain, we held that the Drain property was effectively removed from the market due to Ruth Drain's oral acceptance of the Boggs offer before the receipt of Masins' offer of August 26 and August 28. Respondents contend that it therefore follows that there could be no unlawful discriminatory refusal to sell to them. Appellants, on the other hand, argue that factual differences brought out at

trial should prevent application of that doctrine against them but that strict application of the rule of law of the case mandates judgment in their favor.

The doctrine of "law of the case" requires that both trial and reviewing courts follow principles laid down upon a former appeal in the same case, whether the earlier holdings are right or wrong. (Lindsey v. Meyer (1981) 125 Cal.App.3d 536, 541.) Generally, the doctrine does not extend to points of law which might have been but were not presented and determined in the prior appeal. (Estate of Horman (1971) 5 Cal.3d 62, 73.) Where, however, a particular point was essential to the decision, and the appellate decision could not have issued without its determination, the point will be held impliedly decided, even though not raised by counsel or expressly mentioned

in the prior appeals. (Lindsey v. Meyer, supra, at 541.)

Nevertheless, the doctrine does not give any conclusive effect to determinations of questions of fact unless additional evidence presented at the subsequent proceeding is merely cumulative to evidence of the same class given on the first appeal. (See Estate of Baird (1924) 193 Cal. 225, 234, 244, 245; 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 637, p. 4561.)

Because of additional evidence regarding the early August negotiations, we examined the issues raised on their merits instead of applying the law of the case and, in doing so, have concluded that our decisions in the former appeals were correctly determined. Contrary to appellants' assertions, the record does not compel us to find as a matter of law that Masins had

an oral contract with Drains before Mrs. Drain accepted the Boggs offer. To paraphrase the reviewing court in Duckett v. Silberman (2d Cir. 1978) 568 F.2d 1020, 1024, of crucial significance, where credibility as to rejection of the Masins' offer is an important factor, we decline to second-guess the jury in a case which is essentially factual. They were there. We were not.

4. Attorneys' Fees.

Respondents request attorneys' fees for defending this appeal under our ruling in Jones v. Drain, supra. In Jones v. Drain, we ruled that Bob Jones Realty was required to pay the Drains' attorneys' fees since Bob Jones Realty had requested those fees in its complaint and allegedly would have been entitled to them had it prevailed. The Masins, however, neither pleaded nor alleged they were entitled to attorneys'

fees from the Drains since there was no contract to which they were both parties which contained a provision for attorneys' fees. Therefore, respondents' request is denied.

The judgment is affirmed, each party to bear its own fees and costs on appeal.

NOT TO BE PUBLISHED.

STONE, P.J.

We concur:

GILBERT, J.

ABBE, J.

John W. Holmes, Judge*
Superior Court County of Santa Barbara

Goux, Romasanta & Cappello, A. Barry Cappello and Frances E. Komoroske for

Plaintiffs and Appellants.

Simon & Sheridan and Wilfred A. Hearn, Jr., for Defendants and Respondents.

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*(Retired Judge of the superior court sitting under assignment by the Chairman of the Judicial Council.)

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOSEPH and EVA MARIA MASIN, Petitioners,

v.

VINCENT and RUTH DRAIN, Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of December, 1985, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Wilfred A. Hearn, Jr., Esq., Simon and Sheridan, 2404 Wilshire Boulevard, Ste. 400, Los Angeles, California, 90057, Counsel for the Respondents. I further certify that all parties required to be served have been served.

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Santa Barbara, CA 93101
Counsel for Petitioners